

COVID-19 vaccine procurement in South Africa: What we know, what we don't know and what we should know

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by

Prof Geo Quinot

BA(Law) LLB (Stellenbosch) LLM (Virginia) MA (Free State) MPA (Birmingham) LLD
(Stellenbosch)

Professor, Department of Public Law, Stellenbosch University & Director, African
Procurement Law Unit

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1 Introduction

The COVID-19 pandemic has again highlighted the challenges facing public procurement in South Africa. In his first special audit report on COVID-19 spending, the Auditor-General (AG) reported that:

“[t]he pre-existing deficiencies in the supply chain processes of government were amplified by the introduction of the emergency procurement processes allowed for personal protective equipment. Based on what we have audited to date, there are clear signs of overpricing, unfair processes, potential fraud as well as supply chain management legislation being sidestepped. In addition, delays in the delivery of personal protective equipment and quality concerns could have been avoided through better planning and management of suppliers.”¹

These findings were confirmed in the AG’s second special report on COVID-19 spending, where she found that:

“...we continued to find instances where competitive processes were not followed, resulting in contracts being awarded to a specific supplier or group of suppliers without the necessary motivation or approval for such deviations...Businesses that provide PPE across the country were not treated in a fair and equal manner...For some procurement processes, we could not obtain sufficient evidence to justify the decisions made to disqualify some bidders or to favour specific bidders...Some suppliers delivered PPE that did not meet the required specifications or was not what they had been contracted to deliver, or they under-delivered or delivered late. Despite this, most of the departments still paid the suppliers...We identified ineffective stock management processes, inadequate storage facilities and poor storage practices in both sectors.”²

In this context, one is understandably apprehensive about the next major procurement episode in our response to COVID-19, viz. the procurement of vaccines and the services required to vaccinate the population. While there are signs that government has learnt some lessons from the procurement failures of its early response to the pandemic, there are also worrying signs of continuing challenges. This note sets out what we know about the procurement behind government’s COVID-19 vaccine programme, what we do not know and what we should know.

¹ Auditor-General of South Africa (2020) *First Special Report on the Financial Management of Government’s Covid-19 initiatives*. <https://www.agsa.co.za/Reporting/SpecialAuditReports/COVID-19AuditReport.aspx>.

² Auditor-General of South Africa (2020) *Second Special Report on the Financial Management of Government’s Covid-19 Initiatives*. <https://www.agsa.co.za/Reporting/SpecialAuditReports/COVID-19AuditReport2.aspx>.

2 What we know

The procurement dimension of government's COVID-19 vaccination programme can be divided into two parts. On the one hand there is the procurement of the vaccine itself and on the other hand there is the procurement of the services required to roll out the vaccination programme. For the moment at least, these two parts seem to be being procured separately. However, National Treasury indicated in a letter, dated 18 January 2021, responding to questions about the vaccination procurement programme from Corruption Watch, that this two-part approach would not be followed in the long term, but that "the long-term solution by the Department of Health will be an open competitive bidding process where the contract terms will be for the total cost i.e. the cost of the vaccines, including the cost of logistics (transport and distribution)".³ Government also indicated that contrary to procurement during the first stages of the pandemic, especially of PPE, procurement in the vaccination programme would be centralised with the National Department of Health (NDoH) engaging centrally with suppliers.

2.1 The normal procurement procedure

The prescribed procedure for procurement by national departments of a value above R500 000 is through an open bidding process. This procedure would ordinarily apply to a procurement programme such as the vaccine procurement. At a basic level, this procedure requires the invitation to submit bids to be published in the *Government Tender Bulletin* as well as on government's e-tender portal, which invitation must include the details of the goods or services to be supplied and the terms upon which the relevant department intends to contract.

Bids must be adjudicated against the published adjudication criteria, which may include stated functionality (quality) criteria and must include the price offered and the bidder's Broad-based Black Economic Empowerment (B-BBEE) status. In terms of the Preferential Procurement Policy Framework Act, 5 of 2000, and the Preferential Procurement Regulations, 2017, issued under it, the price and B-BBEE status must be adjudicated in the ratio of 80 (price):20 (B-BBEE) for contracts below the value of R50-million or 90:10 for contracts above the value of R50-million. Any supplier registered on government's central supplier database (CSD) may submit a bid.

However, a department may deviate from the procurement rules governing the prescribed open bidding procedure in a number of ways. Treasury Regulation 16.A6.4, published in terms of the Public Finance Management Act, 1 of 1999 (PFMA), provides that "if in a specific case it is impractical to invite

³ Erasmus, J (2021) Treasury Opens up on Covid Vaccine Procurement Oversight.

<https://www.corruptionwatch.org.za/treasury-opens-up-on-covid-19-vaccine-procurement-oversight/>.

competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means". This mechanism was given further content by means of National Treasury Practice Note 8 of 2007/2008 and National Treasury SCM Instruction Note 3 of 2016/2017. Read together, these provisions allow accounting officers to deviate from the open bidding procedure and use any other procedure, including direct contracting, in cases of emergency or where there is only one supplier of the relevant goods or services. In such cases, the accounting officer must record and approve the reasons for deviation. For transactions above R1-million, the relevant treasury and the AG must be informed of the deviation. An emergency, for purposes of deviations, is defined as "a serious and unexpected situation that poses an immediate risk to health, life, property or environment which calls an agency to action and there is insufficient time to invite competitive bids".

In addition to cases of emergency and sole provider, a national department may also apply to Treasury for approval to deviate from the prescribed bidding procedure in other exceptional cases where it is also impractical to invite competitive bids. No further indication is given as to what circumstances would qualify as exceptional in this sense, which renders this basis for deviation very broad.

Apart from the procurement-specific deviations allowed under the Treasury regulations and Treasury instruction notes, the PFMA in section 79 also allows National Treasury to approve departures from any regulations or instructions made under the Act generally, upon good grounds. Again, no further guidance is given on what may constitute such grounds, but one can imagine that extreme urgency or emergency situations may constitute good grounds. When Treasury approves such departure, it must inform the AG.

2.2 Vaccine procurement

As far as the procurement of the vaccines is concerned, there are again two parts to the procurement. Firstly, government procured vaccines via the COVID-19 Vaccines Global Access (COVAX) initiative. Secondly, government is procuring vaccines directly from manufacturers. The approach to procurement for these two parts differs slightly, but both involve deviations from the prescribed competitive bidding procedure.

For the COVAX procurement, the NDoH applied to Treasury on 29 September 2020 for a deviation from the open bidding procurement procedure to allow it to use direct contracting to acquire vaccines via COVAX. This application was approved by Treasury on 23 November 2020. It is unclear whether this application was brought under section 79 of the PFMA as a general departure from the procurement rules prescribed in the Treasury Regulations and Instruction Notes, or whether it was brought more specifically as a deviation from the competitive bidding procedure in terms of Instruction Note 3 of 2016/2017. Nothing really turns on this distinction, since Treasury would on both avenues have the authority to grant such a departure/deviation if there were good reasons justifying the departure. The fact that prior Treasury approval was sought indicates that the NDoH did not rely on the emergency procurement rules for the vaccine procurement.

In respect of procurement from vaccine manufacturers directly, the NDoH also applied to Treasury on 6 January 2021 for approval to deviate from the prescribed open bidding procedure. In this case, the NDoH applied to contract directly with four listed manufacturers of existing vaccines, viz. Pfizer, AstraZeneca (via its distributors, CIPLA and SII), Moderna and Johnson & Johnson. In addition, the NDoH applied for the option to contract with any other manufacturer that may have vaccine stock available. This application was approved by Treasury on 6 January 2021 for a six-month period.

Both applications were approved on the basis of urgency. Treasury accepted that the NDoH had to act urgently to secure supply of vaccines from those suppliers that had stock available and that a competitive bidding procedure would not be practical given the urgency. In the case of COVAX, Treasury also accepted that this was a tailored supply mechanism that was best suited to secure equitable access to vaccines that could not be accommodated within an open bidding procedure.

On 5 February 2021, health minister Zweli Mkhize indicated to Parliament's Portfolio Committee on Health that the NDoH has, in terms of above procedures, had secured 1.5-million doses of the AstraZeneca vaccine via COVAX, which were delivered to South Africa on 1 February 2021, and that 12-million doses were expected from COVAX. The minister further indicated that agreements were being finalised with Johnson & Johnson for 9-million doses of its vaccine at a price of \$10 (R146) per dose and with Pfizer for 20-million doses of its vaccine for an undisclosed price.

Very little detail has been made available on the terms of these supply contracts. In its presentation to the Health Portfolio Committee on 5 February, the NDoH noted that a no-fault compensation system for adverse events was a precondition for supply from Johnson & Johnson, while the minister noted in his public briefing on 10 February, that the terms would be finalised within "the following day or two". In the same briefing, the minister also indicated that government was considering an offer of vaccines by Sinopharm of China and that "a non-disclosure agreement has been signed" in this regard.

2.3 Rollout procurement

To roll out the vaccination programme, the NDoH also approached Treasury for a deviation from the open bidding procedure. On 7 January 2021, the NDoH applied to use single source contracting to appoint the Biovac Institute for three months to provide storage and distribution services for the vaccine rollout and to issue a closed bid to four service providers, viz. Biovac Institute, Imperial Health Sciences, DSV and United Pharmaceutical Distributors, to supply storage and distribution services for six months. Treasury approved both deviations on 7 January on the basis of the urgency of securing these services in relation to the vaccines procured via COVAX.

On 5 February 2021, the NDoH issued an invitation to bid for the provision of importation services and logistics services for the vaccine rollout programme for the period 1 April to 31 December 2021. This invitation was issued under the normal open bidding procedure and in terms of the ordinary rules governing this procedure. The 90:10 adjudication methodology was indicated for the price:B-BBEE adjudication, indicating that a price above R50-million was envisaged. No pre-qualification criteria

relating to B-BBEE or SMME status were set for participation in the tender. The closing date for submission of bids is 22 February. The tender invitation in relation to importation services envisages a framework-type arrangement in terms of which all responsive bidders are placed on a panel of service providers.

When the NDoH requires these services, it will approach the panel for quotations and adjudicate the quotations based on price and B-BBEE status. For the logistics services, a national contract is envisaged with a preferred bidder and a reserve bidder. The latter will be called upon to render logistics services whenever the preferred supplier does not have the capacity to perform the required services.

3 What we don't but probably should know

There are some important gaps in the information currently available pertaining to the procurement behind government's vaccination programme. Some of this vagueness may simply be because the relevant aspects have not yet been finalised. However, in relation to other aspects, the information should be available.

One can certainly understand the move to centralise the procurement relating to the vaccination programme, especially in light of the challenges experienced during the highly decentralised procurement characterising the early responses to the pandemic. However, uncertainty remains around the exact role of provinces and, to a limited extent, the private sector. In his briefing to the Health Portfolio Committee on 5 February 2021, Mkhize stated that government was procuring the vaccines centrally and "then supplying both the private and the public sector for distribution". At the same time, Western Cape premier Alan Winde stated on 4 February that the Western Cape had established a "framework for provincial contingency vaccine acquisition (and procurement), to supplement the national acquisition plan". It is unclear whether other provinces or other organs of state are also considering such additional vaccine procurement programmes.

From a legal perspective, provinces (and quite likely a host of other organs of state) have the power to procure vaccines on their own. That is, the law does not provide for mandatory participation in centralised procurement in South Africa. To the extent that a particular organ of state can show that procuring vaccines falls within its legal mandate, it should be able to do so on its own. That is largely due to the highly decentralised public finance framework under the PFMA and Local Government: Municipal Finance Management Act, 56 of 2003 (MFMA), which include procurement. In terms of this framework, organs of state by way of their respective accounting authorities, are individually mandated and thus responsible for their own spending.

Another major area of uncertainty relates to the terms of the supply contracts for the vaccines. While government leaders keep using phrases such as vaccines have been "secured" and that manufacturers have "committed" doses, it is unclear whether any vaccine supply contracts have actually been signed, apart from the agreement to participate in the COVAX initiative. At the very least, an agreement with

Johnson & Johnson seems to be either already signed or on the brink of being signed, bearing in mind the minister of health's remark on 10 February that the terms would be finalised within "the following day or two" and the president's indications of delivery specifics in his State of the Nation Address on 11 February.

However, the specific terms of such an agreement remain unclear. Of particular concern is the indication that such an agreement may contain a no-fault compensation system for adverse events and that these agreements may include non-disclosure clauses. There are also concerning signs regarding the costs. The NDoH indicated to Parliament that the Johnson & Johnson vaccine would cost \$10 per dose. However, Mkhize was much more circumspect about the price per dose in his public briefing on 10 February. He indicated that the exact price would be negotiated as supply was agreed upon and noted specifically that urgent availability was a factor, adding that "we're prepared to do anything to deal with it so we will get the final proposal in the next day or two and then we will be able to explain how much can be obtained without payment...and how much we're paying for the rest of the other vaccines".

All these uncertainties raise questions about whether the agreements will meet the constitutional requirement that public contracts must be concluded in terms of "a system which is fair, equitable, transparent, competitive and cost-effective". If, for example, these vaccine supply contracts contain non-disclosure terms, transparency will be seriously reduced and with it any attempt at establishing whether the contracts were, for example, competitive and fair.

Globally, serious questions have been asked about the fairness of some of the vaccine supply contracts in light of significant public funding for the development and approval of the relevant vaccine, which is subsequently bought at great cost, again from public funds. For example, Moodley and Rossouw have questioned in *The Conversation* why South Africa paid double the price per dose (\$5.25) than European Union countries (\$2.16) for its first batch of the AstraZeneca vaccine, despite hosting a clinical trial.⁴

At a more specific level, there are questions about government's approach to the procurement of the rollout services. It is unclear, for example, why a deviation was required to obtain the initial logistics services, both for the direct contracting with Biovac and the subsequent closed bid. It seems difficult to follow how these procurements could be described as urgent. The need for these services would have been known at least since September 2020, when government formulated its plans to procure the first batches of vaccines via COVAX. Subsequently, the NDoH launched an open bidding procedure on 5 February with a closing date of 22 February to procure the very same services from 1 April. One

⁴ Moodley, K & Rossouw, T (2021) South African COVID-19 vaccine trials hold key lessons for future partnerships. *The Conversation*. <https://theconversation.com/south-african-covid-19-vaccine-trials-hold-key-lessons-for-future-partnerships-154676>.

wonders whether this deviation meets the first of the three requirements for deviation from competitive bidding as formulated by the Supreme Court of Appeal in *Chief Executive Officer, South African Social Security Agency v Cash Paymaster Services (Pty) Ltd* 2012 (1) SA 216 (SCA) where it stated that “there must be a valid and *rational* reason for the decision to deviate from the usual tender procedures”. Furthermore, it is unclear how the four suppliers were selected to be included in the closed bid for the initial six months of distribution. Also, Treasury indicated that part of the approval of the deviation for the closed bid was that the NDoH “must ensure that the closed bid process does not in any way prejudice any other supplier who has the required storage and distribution capabilities”. It is far from clear how the NDoH will adhere to this requirement given that the very nature of a closed bid is that no other suppliers participate other than those pre-selected to bid, i.e. the four identified suppliers.

4 Conclusion

Public trust is undoubtedly a major factor in the success of any mass COVID-19 vaccination programme. The efficacy of such a programme hinges on vaccinating enough of the population to achieve herd immunity, which in turn hinges on enough people adequately trusting the programme to seek vaccination. Thus, apart from the constitutional values of good public governance, which require high levels of transparency, such transparency in government’s vaccination programme is also essential for the very success of the programme, since without transparency there cannot be public trust.

Government clearly has taken some important lessons from the procurement failures during the early stages of the COVID-19 pandemic and has sought to avoid a repeat, for example, by centralising key aspects of the procurement of vaccines and the services required for the rollout. However, concerns remain over the procurement behind the vaccine programme. These include important information deficits pertaining to the content and process of such procurement. One hopes that the relevant information will be made public as soon as possible as an important step to ensure public trust in this essential programme.